PD-1049-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/27/2019 10:44 AM
Accepted 10/1/2019 1:32 PM
DEANA WILLIAMSON
CLERK

No. _____

In the
Texas Court of Criminal Appeals
At Austin

FILED
COURT OF CRIMINAL APPEALS
10/1/2019
DEANA WILLIAMSON, CLERK

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No. 14-17-00785-CR
In the Court of Appeals for the
Fourteenth District of Texas
at Houston

———♦———

ZAID ADNAN NAJAR
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S PETITION FOR DISCRETIONARY REVIEW

———♦———

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

In the event this Honorable Court grants the State's petition for discretionary review, the State respectfully requests oral argument. The Fourteenth Court of Appeals' opinion misconstrued the applicable standards for reviewing a trial court's denial of a motion for new trial, and established precedent that conflicts with this Court's holdings. Oral argument would facilitate a just resolution to this matter; and so the State respectfully requests that this Court grant the parties the opportunity to present oral argument.[1]

[1] *See* TEX. R. APP. P. 68.4(c).

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), the undersigned includes a complete list of all interested parties below:

Counsel for the State:

Kim Ogg—District Attorney of Harris County

Stacey M. Soule—State's Prosecuting Attorney

Jessica Caird—Assistant District Attorney on appeal

Sarah Neyland & Twyannette Wallace—Assistant District Attorneys at trial

Appellant or criminal defendant:

Zaid Adnan Najar

Counsel for Appellant:

Jonathan D. Landers—Attorney on appeal

Emily Shelton & Gerald Fry—Attorneys at trial

Trial Judge:

Honorable Ramona Franklin—Judge Presiding

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STATEMENT OF THE CASE

The State charged appellant by indictment with the felony offense of evading by motor vehicle.[2] Appellant pled not guilty, but a jury returned a guilty verdict.[3] The trial court assessed sentence at ten years confinement in the Texas Department of Criminal Justice, Institutional Division probated for four years.[4] Appellant filed timely written notice of appeal and a motion for new trial.[5]

The trial court conducted a hearing on appellant's motion for new trial, but after the hearing, the trial judge denied the motion.[6] He appealed contending that the trial court erred when it denied his motion for new trial.[7] The Fourteenth Court of Appeals reversed the trial court's ruling after it held that the trial court lacked discretion to deny appellant's motion for new trial.[8]

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[2] (CR-11);
The appellate record consists of the following:
CR-Clerk's Record;
RRI-RRVI-Court Reporter's Record from July 14-18, 2017, prepared by Julia E. Johnson.
[3] (CR-72, 73).
[4] (CR-73).
[5] (CR-83-111, 119).
[6] (RRV; CR-111).
[7] (Appellant's Brief at 2).
[8] *Najar v. State*, No. 14-17-00785-CR, __ S.W.3d __, 2019 WL 4072300, slip op. at 8 (Tex. App.—Houston [14th Dist.] Aug. 29, 2019, pet. filed)(attached as Appendix A).

STATEMENT OF THE PROCEDURAL HISTORY

On August 29, 2019, the Fourteenth Court of Appeals issued a published opinion in which it reversed the criminal court's order of conviction and remanded the matter to the trial court for a new trial after it found that juror misconduct necessitated reversal pursuant to Texas Rule of Appellate Procedure 21.3(f).[9] One of the three justices on the panel published her dissent to the majority's holding in which she explained that the majority misapplied the standard of review, as well as the applicable law.[10] She concluded that the majority erred when it failed to apply Texas Rule of Evidence 606(b) to the appellate analysis of the evidence received during the new trial hearing.[11] And she disagreed with the holding that a siren constituted "other evidence" for purposes of applying Texas Rule of Appellate Procedure 21.3(f).[12] The State now timely files this petition for discretionary review in accordance with Texas Rule of Appellate Procedure 68.2(a).

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[9] *Najar*, No. 14-17-00785-CR, slip op. at 8-10.
[10] *Najar*, No. 14-17-007785-CR, __ S.W.3d __, 2019 WL 4072300, at slip op. 1-3 (Christopher, J., dissenting)(attached as Appendix B).
[11] *Id*., slip op. at 1-2 (Christopher, J., dissenting) (Appendix B).
[12] *Id*., slip op. at 3-5 (Christopher, J., dissenting) (Appendix B).

STATE'S GROUNDS FOR REVIEW

1. **Was the trial judge required to believe the affidavits of defense attorneys when the State did not object to their admission, or did she have discretion to disregard their contents?**

2. **Does a police siren heard in the distance constitute a basis for which the trial court had no discretion but to grant a new trial as "other evidence" received during deliberations?**

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REASONS FOR GRANTING REVIEW

Texas Rule of Appellate Procedure 66.3(c) supports this Court's granting discretionary review to assess whether the Fourteenth Court of Appeals erred when it relied solely on case law that predated the creation of Texas Rule of Evidence 606(b) in disregard to this Court's more recent holdings in *Colyer v. State* and *McQuarrie v. State*.[13] This Court's 1980 panel opinion in *Alexander v. State* does not circumvent the required Rule 606(b) analysis performed in *Colyer* and *McQuarrie*.[14] The cases decided after implementation of the Texas Rules of

[13] *See Colyer v. State*, 428 S.W.3d 117 (Tex. Crim. App. 2014); *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012); *see also* Tex. R. Evid. 606(b) (effective on March 1, 1998).

[14] *See Alexander v. State*, 610 S.W.2d 750 (Tex. Crim. App. [Panel Op.] 1980) (holding a new trial is mandated if the " 'other testimony" was heard by the jury and was adverse to the accused without speculation on the probable effects on the jury and without regard whether the "other evidence" injured the defendant, but decided before Rule 606(b) prohibited trial judges from inquiring into the deliberations and the thought

Evidence 606(b) controlled the analysis of juror statements that described matters and incidents that may have occurred during deliberations even when offered through a defense attorney's affidavit.[15]

Additionally, Rule 66.3(c) supports granting review because the Fourteenth Court of Appeals' opinion failed to abide by this Court's holdings in *Charles v. State* and *Okonkwo v. State*, which required it to defer to the trial court's implied finding that counsels' affidavits lacked credibility.[16] The Fourteenth Court of

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processes of the jury); *but see* Tex. R. Evid. 606(b) (prohibiting testimony or other evidence from a juror about statements made or incidents that occurred during jury deliberations from any source, unless it describes an outside influence improperly brought to bear on a juror or rebuts a claim of juror disqualification); *Colyer*, 428 S.W.3d at 122-130 (holding that the trial court must perform a Texas Rule of Evidence 606(b) analysis on the juror's statements even without an express objection on that basis, and finding a call from a doctor and internal pressure did not amount to an outside influence improperly brought to bear on the juror); *McQuarrie*, 380 S.W.3d at 150-55 (applying Rule 606(b), but finding that the juror's internet research discussed with fellow jurors constituted an outside influence when a hypothetical average juror would have been prejudiced by the information).

[15] *See* Tex. R. App. P. 66.3(c); *compare also Colyer*, 428 S.W.3d at 122-130 (addressing Rule 606(b) even without objection); *McQuarrie*, 380 S.W.3d at 150-55 (applying Rule 606(b)); *with Alexander*, 610 S.W.2d at 751-53 (holding a new trial is mandated if "'other testimony" was heard by the jury and was adverse to the accused without analyzing the probable effects on the jury and without regard to whether it injured the defendant); *see also* Tex. R. Evid. 606(b) ("During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statements on the matter….except[ ]….[a] juror may testify; (a) about whether an outside influence was improperly brought to bear on any juror[.]") (effective on March 1, 1998).

[16] *See* Tex. R. App. P. 66.3(c) (permitting review when decision conflicts with this Court's decisions); Tex. R. App. P. 606(b) (barring admission of a juror's statements about, inquiries into, or the effect of anything on a juror's mental processes or vote);

Appeals held in contradiction to *Colyer*, *Charles*, and *Okonkwo* that the trial judge could not disregard the inadmissible statements related by defense attorneys who described jury deliberations, and that the trial court could not find that the affidavits lacked credibility.[17]

Texas Rule of Appellate Procedure 66.3(e) applies to permit review based on the disagreement between the justices on the Fourteenth Court of Appeals' panel that heard this case.[18] The justices disagreed about the applicable standard of review, as well as the evidentiary analysis required under Texas Rule of Evidence 606(b).[19] Lastly, Texas Rule of Appellate Procedure 66.3(f) supports review because the majority has so far departed from the accepted and usual course

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see also Charles v. State, 146 S.W.3d 204, 210 (Tex. Crim. App. 2004) (holding even when presented with an affidavit, the trial judge had discretion to discount factual assertions from interested parties, and the reviewing court had to defer to the ruling if "any reasonable view of the record evidence…support[ed]" it); *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (holding a reviewing court must defer to the trial judge's assessment of an uncontroverted affidavit because trial judge is the sole factfinder in a motion for new trial hearing, and the reviewing court should have considered the implicit finding that the trial court found that the affidavit lacked credibility).

[17] *See* Tex. R. App. P. 66.3(c) (permitting review when decision conflicts with this Court's decisions); Tex. R. App. P. 606(b) (barring admission of testimony from a juror about statements made, incidents that occurred, and inquiries into the effect of anything on a juror's mental processes or vote); *see also Colyer*, 428 S.W.3d at 127 ("Thus, under Rule 606(b), the trial judge is not permitted, much less required, to consider [a juror's] testimony to impeach his verdict."); *Charles*, 146 S.W.3d at 210 (holding that the trial judge had discretion to discount factual assertions from interested parties in an affidavit); *Okonkwo*, 398 S.W.3d at 694 (deferring to trial judge's implicit finding that affidavit lacked credibility).

[18] *See Najar*, 14-17-00785-CR (Tex. App.—Houston [14th Dist.] Aug. 29, 2019) (Christopher, J., dissenting) (Appendix B).

of judicial proceedings as to call for the exercise of this Court's powers of supervision.[20]

STATEMENT OF FACTS

I. A police officer activated his lights and siren as he attempted to pull appellant over for speeding.

A police officer in a marked patrol car observed appellant speeding, and he noticed appellant had red and blue lights that showed through the front windshield of his car.[21] As soon as the officer flashed his emergency equipment, appellant turned the blue and red lights off, but he continued to speed.[22] The officer turned on his emergency blue and red lights along with the patrol vehicle's siren.[23] Appellant traveled at speeds over 100 miles per hour in a congested area on 610 Highway in Houston.[24]

Appellant's actions caused other drivers to slam on their brakes and veer out of his way.[25] Appellant decelerated after the officer began to chase him, but only

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[19] *See id*., slip op. at 1-5.
[20] *See Najar*, slip op. at 1-10 (attached as Appendix A).
[21] (RRIII-15, 20, 32).
[22] (RRIII-20-21, 32).
[23] (RRIII-21-22).
[24] (RRIII-22).
[25] (RRIII-24).

to roughly 80 miles per hour, and appellant continued to weave through traffic.[26] He slow down to avoid other drivers.[27] During the two-mile chase, appellant veered across four lanes of traffic from the far left to the right lane as he passed three exits without leaving the highway.[28] Upon entering the far right lane, rather than exit, appellant cut back to the far left lane.[29] He did not signal any of his abrupt lane changes.[30] After about 1 minute and 15 seconds to 1 minute and 45 seconds, appellant pulled back to the far right shoulder and stopped.[31]

The officer noted that appellant could have stopped in multiple locations after the officer activated his lights and siren.[32] The officer followed appellant across the highway twice, and so he believed a reasonable person would have known the officer sought to stop appellant.[33] Other drivers yielded to the patrol car's emergency lights and siren during the chase, unlike appellant.[34]

[26] (RRIII-51).
[27] (RRIII-51).
[28] (RRIII-24).
[29] (RRIII-24).
[30] (RRIII-24).
[31] (RRIII-24).
[32] (RRIII-17, 18-19, 22, 25).
[33] (RRIII-26, 75).
[34] (RRIII-32, 75).

II. Appellant filed a motion for new trial in which he claimed that jurors committed misconduct because they considered the volume of a police siren heard from outside the courthouse during deliberations.

Appellant timely filed a motion for new trial that alleged the jury received and considered other evidence after deliberations began.[35] He alleged that after the jury returned its verdict, jurors spoke to the trial attorneys and revealed that they heard a siren outside on the street while they deliberated, and that the jury considered the volume of the siren.[36] Defense attorneys, in turn, concluded that the siren influenced the jury's verdict.[37] Appellant argued the information harmed his defense because he may not have realized the officer was behind him, although he presented no evidence to that affect during the trial.[38]

a. Appellant's trial attorneys provided affidavits that addressed statements made by two jurors about the jury's deliberations.

The motion for new trial included affidavits from appellant's two trial attorneys.[39] The trial attorneys described the statements made by two jurors after conviction.[40] The affidavits stated that one juror said she heard a siren outside on the street, and the fact that jurors could hear it influenced their verdict because "[t]hey believed that if they could hear the siren from inside the building, that

[35] (CR-83-84).
[36] (CR-83-84).
[37] (CR-83-84).
[38] (CR-85); *but see* (RRIII-76-79).
[39] (CR-93, 95).
[40] (CR-93, 95).

[appellant] could have heard an officer's siren inside his car."[41] Another juror believed that the defendant should have slowed down when he heard the siren, even if he did not believe himself to be the target of the officer's traffic stop.[42] The State offered no objection to admission of the affidavits into evidence for purposes of the new trial hearing.[43] The parties then discussed the hearsay aspects of trial counsel relaying comments from jurors, as well as whether the siren constituted an "outside influence" on jurors from which the jury "received other evidence" during deliberations.[44]

The defense argued the siren constituted an outside influence and equated it to an experiment conducted by the jury.[45] The prosecutor responded that the allegations raised in the affidavits did not describe the jury having received an outside influence.[46] She cited this Court's opinion in *McQuarrie v. State*, which discussed whether the influence originated from a source outside the jury room, or outside the jurors themselves.[47] She later argued that when a juror heard a siren, it did not amount to an experiment and she differentiated the jurors' experiences here

[41] (CR-93, 95).
[42] (CR-95).
[43] (RRV-4, 5).
[44] (RRV-7-9, 14-19).
[45] (RRV-9-10).
[46] (RRV-14-15).
[47] (RRV-15).

from that of the jurors in *McQuarrie*.[48] She explained that the law permitted jurors to rely on their own common sense, general experiences, and perceptions.[49] No misconduct occurred when jurors relied on their personal experiences with the volume of a police siren or their recollections of a traffic stop conducted by a police officer.[50]

b. The trial judge denied the motion for new trial after she found that jurors could rely on their own experiences, including their knowledge about how easily one might hear a police siren.

The trial judge ruled after her reviewed the case law that she expected jurors to draw from their own experiences and perceptions while deliberating.[51] She found that most jurors had general experiences with the volume of a police siren.[52] She denied the motion for a new trial.[53]

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[48] (RRV-15-16).
[49] (RRV-16).
[50] (RRV-16).
[51] (RRV-20).
[52] (RRV-20).
[53] (RRV-20-21).

STATE'S FIRST GROUND FOR REVIEW

Was the trial judge required to believe the affidavits of defense attorneys when the State did not object to their admission, or did she have discretion to disregard their contents?

As the dissent noted, the majority ignored the abuse of discretion standard when it concluded that the trial judge had no discretion to disbelieve the statements in the affidavits or the conclusions the defense drew from them because the State did not object to the affidavits' admission.[54] Yet the abuse of discretion standard has long allowed the trial judge to ascertain the facts and determine the credibility of the evidence.[55] This standard demands that the reviewing court imply any factual finding necessary to support the trial court's decision when the record supported it.[56] Without regard to this Court's holdings in *Charles v. State*,

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[54] *Compare Najar*, slip op. at 5-6 (contending that although the abuse of discretion standard applied to motions for new trial, under Rule 21.3(f) the trial court had no discretion but to grant the new trial when there was "no fact issue that the jury received other evidence, and the evidence was adverse to the defendant….") (citing *Rogers v. State*, 551 S.W.2d 369, 370 (Tex. Crim. App. 1977)) *with Najar*, slip op. at 1-3 (Christopher, J., dissenting) (dissenting because the majority failed to apply the abuse of discretion standard when it would not acknowledge that the trial judge could have disregarded the inadmissible evidence).

[55] *See Colyer*, 428 S.W.3d at 122 (noting the judge alone determines the credibility of the witnesses, and even if testimony is not controverted or subject to cross-examination, has the discretion to disbelieve it).

[56] *Charles*, 146 S.W.3d at 208-11 (presuming all reasonable factual findings have been made against the losing party, applying a deferential standard to trial court's determination of historical facts, and noting the trial court can disbelieve even uncontested factual assertions in an affidavit from an interested party); *Okonkwo*, 398 S.W.3d at 694 (noting the trial court is the fact finder and sole judge of the credibility

Okonkwo v. State and *Colyer v. State*, the majority opinion returned to the pre-Texas Rules of Evidence opinion in *Alexander v. State*.[57] Based on *Alexander*, it found that the trial judge had no discretion to disbelieve any uncontroverted statement in the affidavits when the State did not oppose admission of the affidavits or rebut with conflicting evidence each claim included in them.[58]

I. As the factfinder, the trial court had discretion to disbelieve and disregard even uncontroverted assertions made in the affidavits.

This Court addressed the difference between "uncontradicted testimony" and "undisputed facts" in *Colyer*.[59] The opposing party need not present conflicting

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at a new trial hearing, the appellate court affords almost total deference to historical findings and even mixed findings that turn on credibility and demeanor, including to assessment of uncontroverted affidavits); Tex. R. Evid. 606(b) (effective Mar. 1, 1998); *but see Alexander*, 610 S.W.2d at 751-53 (permitting the trial judge to consider affidavits from jurors that addressed deliberations, and finding the State had to rebut each allegation or the trial judge had no discretion to disbelieve it).

[57] *Compare Colyer*, 428 S.W.3d at 122 (distinguishing uncontroverted from undisputed facts); *Charles*, 146 S.W.3d at 208-11 (permitting trial judge to disbelieve affidavit); *Okonkwo*, 398 S.W.3d at 694 (same) *with Alexander*, 610 S.W.2d at 751-3 (holding before creation of Rule 606(b) that when State made no attempt to controvert a fact learned from a single juror, and when it did not rebut the testimony, the trial court erred by refusing to grant a new trial based on the uncontroverted assertion); *Najar*, slip op. at 6-7 (applying *Alexander* and *Rogers* to hold that State did not controvert that jury received "other evidence" and thus the trial judge had to accept that determination as an undisputed fact) (citing *Rogers*, 551 S.W.2d at 370); *see also Rogers*, 551 S.W.2d at 370 (holding the trial judge had no discretion but to grant a new trial when there was no fact issue about whether the jury received other evidence, but decided before creation of Rule 606(b)).

[58] *See Najar*, slip op. at 6-7 (citing *Alexander*, 610 S.W.2d at 751-2; *Rogers*, 551 S.W.2d at 370).

[59] *Colyer*, 428 S.W.3d at 122 ("In explaining the distinction between 'uncontradicted testimony' such as [the juror's] and 'undisputed facts' (such as those facts both parties agree to or that are subject to judicial notice), we have noted that 'a defendant's

evidence on every statement to dispute the particular facts alleged and the conclusions reached from them.[60] As the example in *Colyer* explained, the defendant's mother may testify that the defendant was with her elsewhere at the time of the murder, and the State need not cross-examine her to claim later that she provided untruthful testimony.[61] The failure to refute the particular statement when she made it does not render the statement an "undisputed fact."[62] Similarly, even had the prosecutor agreed that a juror mentioned hearing a siren during deliberations, that agreement did not support the majority's belief that it then became an undisputed fact the jury received "other evidence" during its deliberations.[63]

Yet the record shows the prosecutor may not have so readily agreed that a juror made such a statement. From the following exchange, the majority held the State agreed as an undisputed fact that the jury received "other evidence" during deliberations:

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mother may testify that the defendant was with her in Oshkosh on the night of the murder. Even though the State does not cross-examine the defendant's mother, the jury is not required to believe her uncontradicted testimony.'").

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *Compare id.* (distinguishing uncontradicted testimony from an undisputed fact) *with* (RRV-4) (agreement by prosecutor either that it disputed the defendant's understanding of the law or agreed to the "factual basis of that affidavit" without regard to the conclusions the defense drew from them).

> **Defense counsel:** ….I'd offer [the affidavits] into evidence. On those I would like to point out, I think the State agrees with the factual basis of that affidavit, which is, this conversation with the jury took place. I know we have a dispute on the law. I don't know if that's correct, for the record."
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> **Prosecutor:** That's correct.[64]

The majority concluded that "[t]he State's counsel affirmed that it agreed with the factual basis of this affidavit, specifically that the 'conversation with the jury took place.' The State neither contested that the jury heard and discussed the siren while deliberating, nor that the members of the jury had relied on their ability to hear the siren in finding appellant guilty."[65] The State may have affirmed the factual basis of the conversation or it may have affirmed merely that it disputed the law, or both.[66] Even so, the State offered no agreement to the conclusions the defense reached based on the conversation, namely that the siren influenced the jury, constituted other evidence, or amounted to an outside influence.[67]

Moreover, even with uncontroverted statements, the judge may choose to disbelieve statements in an affidavit from an interested party.[68] This Court applied a deferential standard to the trial court's factual determination because the trial judge had discretion to discount factual assertions in an affidavit and the appellate

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[64] (RRV-4); *but see Najar*, slip op. at 6.
[65] *Najar*, slip op. at 6.
[66] *See* (RRV-4).
[67] *See* (RRV-4, 14-18).

court should defer to that ruling.[69] Without express findings of fact and conclusions of law, the reviewing court had to presume all implicit findings in favor of the trial court's ruling, and thus should have found that the trial court disbelieved the defense attorney affidavits or the conclusions reached from them, namely that the jury received outside evidence detrimental to the defense.[70]

In *Okonkwo*, this Court afforded deference to the trial court's implicit finding that the affidavit from defense counsel lacked credibility, and that the lower court should have deferred to that finding.[71] Even had the State agreed that the conversation with the jurors about the siren occurred, the record supports the trial court's ruling because the State controverted throughout whether that siren constituted "other evidence" received by the jury detrimental to the defendant.

The trial judge had authority to disbelieve the affidavits' conclusion that the siren improperly influenced the jurors even without the State offering conflicting or rebutting evidence.[72] The prosecutor need not expressly dispute that a conversation with the jury took place for the trial court to find against the notion that the jury received other evidence detrimental to appellant. The law did not require the State to contest through cross-affidavits or cross-examination each fact

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[68] *Charles*, 146 S.W.3d at 210.
[69] *Id.*
[70] *See id*. at 211.
[71] *Okonkwo*, 398 S.W.3d at 694.
[72] *See Charles*, 146 S.W.3d at 210-211; *Okonkwo*, 398 S.W.3d at 694.

alleged in the affidavits to then dispute the overall conclusion to which the majority opinion leapt.[73]

II. Because the trial judge may have disregarded statements made in an affidavit pursuant to Rule 606(b) even without objection, the majority erred when it refused to consider the affidavits' admissibility before it reversed the trial court's denial of the motion for new trial.

Much like the lower court opinion in *Colyer*, the majority refused to analyze the evidence proffered in the defense affidavits under Texas Rule of Evidence 606(b) because the prosecutor did not object to admission on that basis.[74] The majority found based on what it claimed to be "uncontroverted evidence" that "the jury did not follow the court's charge and considered outside evidence that was adverse on a critical issue[.]"[75]

The majority reached this conclusion after it held that without prosecutorial objection to admission of the affidavits under Rule 606(b), the State had no ability to complain that the siren had not constituted an "outside influence" under Rule

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[73] *See Colyer*, 428 S.W.3d at 122-124.

[74] *Compare Najar*, slip op. at 5, n. 3 (contending that because the State did not address the "outside evidence" claim before closing argument with conflicting evidence, the State had not preserved the Rule 606(b) objection, and the majority need not consider it) *with Colyer*, 428 S.W.3d at 119, n. 3 , 121, 129-130 (granting review in part to determine whether the prevailing party in the motion for new trial must object to inadmissible evidence, and concluding that the trial judge properly disregarded the inadmissible evidence even though the State had not objected on that basis); *see also* (RRV-15-17) (prosecutorial argument that statements in the affidavits did not constitute an outside influence on the jury).

[75] *Najar*, slip op. at 2.

606(b) or that it was not "other evidence" received by the jury during deliberations under appellate Rule 21.3(f).[76]

The trial judge had authority to disregard any inadmissible evidence when she made her ruling on the motion for new trial, even without a State's objection.[77] Both this Court in *Colyer* and the Texas Supreme Court in *Golden Eagle Archery, Inc. v. Jackson* held that a trial judge has discretion to disregard inadmissible evidence without an objection from the opposing party.[78] Although a trial judge need not disregard it, she has discretion to do so.[79] The majority erred when it refused to analyze the affidavits under evidentiary Rule 606(b).[80] Under Rule 606(b), the trial judge was within her discretion to find that the siren did not constitute an outside influence improperly brought to bear on the jury.[81]

Moreover, because jurors are barred under the Texas Rules of Evidence from explaining how the siren influenced their verdict, the trial judge had to apply

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[76] *Id*. at 4-5, n. 3.

[77] *See Colyer*, 428 S.W.3d at 127 (holding trial judge must perform a Rule 606(b) analysis before crediting statements made by a juror, and because the juror did not relate an "outside influence", the judge could not consider the statements to impeach the verdict); *see also Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 373 (Tex. 2000) (holding juror's testimony impeaching verdict "was certainly hearsay, and while no objection was made to its admission to preclude the trial court from considering it, the trial court was nevertheless free to disregard the testimony.").

[78] *Id*.; *Golden Eagle*, 24 S.W.3d at 373.

[79] *See id*.; *see also Najar*, slip op. at 1-2 (Christopher, J., dissenting) (dissenting because the majority failed to analyze the claim under Rule 606(b) for an outside influence improperly brought to bear on the jurors).

[80] *See Colyer*, 428 S.W.3d at 127.

[81] *See id*.

the objective, reasonable person test to decide what effect a particular outside influence would have had on a hypothetical average juror, were an outside influence brought to bear on the jury during deliberations.[82] By failing to consider these implicit findings in favor of the trial court's denial of the motion for new trial, the majority erred when it applied an incorrect standard of review that removed all discretion from the trial court.[83]

This Court should grant review of the State's first question, consider the merits, reverse and remand the matter to the Fourteenth Court of Appeals to apply the proper standard of review with the appropriate deference to the trial court's implicit findings on historical facts.

STATE'S SECOND GROUND FOR REVIEW

Does a police siren heard in the distance constitute a basis for which the trial court had no discretion but to grant a new trial as "other evidence" received during deliberations?

Because the majority failed to apply the proper standard of review, it concluded without analysis that the jury received "other evidence" when it heard a

[82] *Colyer*, 428 S.W.3d at 129 (citing *McQuarrie*, 380 S.W.3d at 154) (requiring an objective analysis to determine the reasonable possibility that the outside influence prejudiced the hypothetical average juror).

[83] *See id.*; *see also Charles*, 146 S.W.3d at 211-212.

siren.[84] It reached that conclusion because the State offered no conflicting affidavits that would have been inadmissible under Rule 606(b) had they described contradictory statements about incidents or discussion that occurred during jury deliberations.[85]

I. The majority failed in its duty to analyze whether a siren heard from a distance constituted "other evidence" heard by the jury during deliberations.

After the majority confused uncontroverted with undisputed facts, despite the State's argument throughout that the allegations in the affidavits did not equate to an outside influence or an improper experiment, it held that the trial court had no discretion but to grant a new trial under Rule 21.3(f).[86] But the prosecutor explained that the law expected jurors to consider their own general experience, common sense, and perceptions in reaching a verdict.[87] Knowledge that a siren is loud relates to a personal experience the law expected jurors to rely on.[88]

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[84] *See Najar*, slip op. at 5-6 (holding that the "unobjected-to affidavit" satisfied the "receipt" prong of the Rule 21.3(f) test).

[85] *Compare Najar*, slip op. at 5-6 *with Colyer*, 428 S.W.3d at 122-129 (applying abuse of discretion standard even to uncontradicted testimony, as well as Rule 606(b) to assessment of whether anyone improperly brought an outside influence to bear on jurors).

[86] *See* (RRV-14-18).

[87] (RRV-16).

[88] *See McQuarrie*, 380 S.W.3d at 153 (confining an outside influence to one occurring outside the jury room and "outside of the juror's personal knowledge and experience.").

The majority's failure to analyze the statements in the affidavits necessitates this Court's review to determine whether the jury received "other evidence" after retiring to deliberate as required to demand a new trial under Rule 21.3(f). The majority opinion both contradicts this Court's holdings in *Colyer* and ultimately finds without analysis that any outside extraneous noise, such as a siren, becomes "other evidence" when heard by a jury during deliberations.[89] Because the majority did not consider whether the extraneous sound constituted "other evidence" received during deliberations, it did not properly apply Rule 21.3(f) to its determination of whether the trial court erred.

II. Common knowledge and everyday experience informed jurors that a police siren sounded loud enough to garner a driver's attention, and thus jurors had not received "other evidence" detrimental to the defendant even had they overheard one.

McQuarrie v. State defined an outside influence as something that occurred outside the jury room and "outside of the juror's personal knowledge and experience."[90] In *McQuarrie*, a juror conducted research after court, on her own,

[89] *Compare Najar*, slip op. at 6-7 (failing to analyze the siren to determine whether it constituted "other evidence" when it held the State failed to contest the affidavits) *with Colyer*, 428 S.W.3d at 122 ("Even if testimony is not controverted or subject to cross-examination, the trial judge has discretion to disbelieve that testimony" and explaining uncontroverted does not equate to an undisputed fact).

[90] *McQuarrie*, 380 S.W.3d 153.

and while outside the juror room.[91] She returned and reported the information to the other jurors.[92]

Yet, unlike *McQuarrie*, no juror acted improperly, and no juror returned with knowledge otherwise unknown to herself or the other jurors. Instead, had jurors heard a siren, noted its volume, and concluded that a driver would have been likely to hear a police siren, nothing in the conclusion consisted of evidence beyond what each individual juror knew from personal experience walking, driving, or sitting next to a street when a police siren went by.[93]

This Court has long held that for a new trial to be required under Rule 21.3(f), the jury must both: (1) receive other evidence, and (2) that the evidence must be detrimental or adverse to the defendant.[94] For the jury to "receive other evidence[,]" the evidence must be new and harmful, and that determination is a fact issue for the trial court to decide.[95] In appellant's case, the jury received no

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[91] *See id*. at 154.

[92] *See id*.

[93] *Compare id*. (permitting jurors to consider personal knowledge and experience, but not engage in outside internet research) *with* (CR-93, 95) (claiming a juror said they heard a siren outside during deliberations, and that jurors considered that they could hear it while reaching a verdict).

[94] *See Bustamante v. State*, 106 S.W.3d 738, 743 (Tex. Crim. App. 2003) (citing *Eckert v. State*, 623 S.W.2d 359 (Tex. Crim. App. [Panel Op.] 1981), *overruled on other grounds, Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988); *Stephenson v. State*, 571 S.W.2d 174, 176 (Tex. Crim. App. 1978)).

[95] *See Honeycutt v. State*, 157 Tex. Crim. 206, 248 S.W.2d 124, 125 (Tex. Crim. App. 1952) (finding new and harmful evidence not received by the jury which would have required a new trial); *see also Guice v. State*, 900 S.W.2d 387, 389-90 (Tex. App.—Texarkana 1995, pet. ref'd) (holding new trial not required when jurors discussed the

new evidence were it to overhear a siren because the arresting officer's testimony established that other drivers moved over for the officer after he turned on his lights and siren.[96] He testified that any reasonable person would have known that the officer sought to pull appellant over.[97] The testimony showed based on appellant's actions, as well as the actions of other drivers, that appellant was aware the officer wanted to stop him.[98] And the jury "received" no other evidence because their own personal experiences already notified them that sirens are loud and intended to attract attention.[99]

The majority assessed whether the siren constituted detrimental "other evidence" only based on whether appellant contested the charge against him.[100] It concluded the volume of the siren was "critical to the issue of whether appellant knew he was being signaled…to pull over."[101] With no further discussion, the majority overruled the trial court's implicit factual findings that the jury received no new evidence and that the sound of a siren heard during deliberations did not

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evidence adduced at trial and used that evidence with their own knowledge of firearm because they received no other evidence that was material or detrimental).

[96] (RRIII-21-22, 25).

[97] (RRIII-26, 37, 46-47, 75).

[98] (RRIII-51, 75).

[99] *See Guice*, 900 S.W.2d at 389-90 (holding jurors could consider the evidence with their own general experiences and perceptions to reach a verdict without that general knowledge being "other evidence" received during deliberations).

[100] *Najar*, slip op. at 7.

[101] *Id*.

constitute detrimental "other evidence" based on the overall evidence heard by this jury.[102]

The State respectfully requests that this Court grant review on the second ground for review, consider the merits, and reverse the Fourteenth Court of Appeals because a siren does not constitute other evidence, because the jury did not receive it, and because the extraneous sound was not detrimental to appellant.

———————♦———————

[102] *Compare id*. slip op. at 7-8 (claiming that the "uncontested affidavit" mandated reversal because a siren heard outside the courthouse constituted other evidence detrimental to appellant) *with* (RRIII-21-22, 25-26, 37, 46-47, 51, 75) (establishing that appellant heard the siren and saw the lights when the other drivers on the roadway yielded to the patrol car vehicle, as well as based on appellant's deliberate evasive actions to avoid the stop).

PRAYER

The State respectfully asks this Court to grant the State's petition for discretionary review on both issues, consider the merits, and reverse the decision of the Fourteenth Court of Appeals.

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This is to certify: (a) that the word count of the computer program used to prepare this document reports that there are **4,341** words in the document in compliance with Texas Rule of Appellate Procedure 9.4(i); and (b) that a copy of this instrument is being served by EFileTexas.Gov e-filer to the following email addresses on September 27, 2019:

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APPENDIX A

(The Fourteenth Court of Appeals' majority opinion in *Najar v. State*)

Reversed and Remanded and Majority and Dissenting Opinions filed August 29, 2019.

In the

Fourteenth Court of Appeals

NO. 14-17-00785-CR

ZAID ADNAN NAJAR, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1503083

MAJORITY OPINION

The ultimate issue in this appeal concerns whether the jury followed the trial court's charge: "During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence." As a society, we generally balance the need for confidentiality in jury deliberation

versus the integrity of the jury trial in favor of jury confidentiality.

We also generally presume the jury follows the court's charge. This appeal presents a rare instance in which what occurred during deliberation is open for review. And because the uncontroverted evidence is the jury did not follow the court's charge and considered outside evidence that was adverse on a critical issue, we must reverse.

A jury found appellant Zaid Adnan Najar guilty of the third-degree felony of fleeing, using a vehicle, from a peace officer who was attempting lawfully to detain him. *See* Tex. Penal Code Ann. § 38.04(a), (b)(2)(A).[1] The trial court assessed punishment at ten-years imprisonment, suspended the sentence, and placed appellant on four-years community supervision. In two issues, appellant asserts the trial court erred in denying his motion for new trial based on (1) other evidence received by the jury during deliberation and (2) a claim of ineffective assistance of counsel regarding his trial counsel's advice on the immigration consequences of the State's plea offer. Because we find the trial court erred in denying appellant's motion for new trial, we reverse the trial court's judgment and remand the case for further proceedings.[2]

[1] *Vernon's Texas Codes Annotated Penal Code* contains an editorial note which suggests that the legislature has enacted two versions of Penal Code section 38.04(b)(1), (2). While this is not a contested issue in this appeal, and we make no explicit holding, it nonetheless appears that only one version of subsection 38.04(b)(1), (2) exists. *See* Act of May 23, 2011, 82d Leg., R.S., ch. 391, § 1, 2011 Tex. Gen. Laws 1046, 1046, *amended by* Act of May 24, 2011, 82d Leg., R.S., ch. 839, § 4, 2011 Tex. Gen. Laws 2010, 2011, *amended by* Act of May 27, 2011, 82d Leg., R.S., ch. 931, § 3, 2011 Tex. Gen. Laws 2321, 2322.

[2] A defendant's general right to appeal under Code of Criminal Procedure article 44.02 has always been limited to appeal from a "final judgment." *State v. Sellers*, 790 S.W.2d 316, 321 n.4 (Tex. Crim. App. 1990). Although appellant argues the trial court's error was in denying his motion for new trial, we may only reverse the judgment being appealed and not merely the order denying the motion for new trial.

BACKGROUND

A. Appellant's Arrest

On March 17, 2016, at approximately 10 p.m., Officer Bachar of the Houston Police Department observed a white Ford Mustang driving at 100 miles per hour in the far-left lane of the I-610 freeway in the Galleria area. Bachar also noticed flashing red-and-blue lights emanating from the vehicle. At first glance, Bachar thought the vehicle was a law enforcement vehicle because of the flashing lights. However, upon a closer look, he realized it was a private vehicle. At that point, Bachar turned on his own emergency equipment, which included flashing lights and a siren. Bachar followed the vehicle for approximately two miles before the vehicle pulled over. During that time, the vehicle's driver cut across three lanes of traffic into the far-right lane. Bachar testified that he believed the driver was going to exit the freeway at this point; however, the driver then went back across the three lanes of traffic until the vehicle was again in the far-left lane. At no time did the vehicle's driver use his turn signals to indicate lane changes. When Bachar was within twenty-five feet of the vehicle, it came to a sudden stop in the right-hand shoulder of the freeway. Bachar then approached the vehicle and identified appellant as the driver.

B. Trial

During her opening statement, appellant's trial counsel emphasized that appellant was already driving over 100 miles per hour when Bachar turned on his lights and siren. Counsel pointed out that appellant's vehicle was surrounded by other vehicles on the freeway for the two-mile period during which Bachar attempted to signal to appellant to pull over. Counsel further emphasized that it was not until Bachar was within close range of appellant that appellant immediately decelerated. Bachar was the only witness to testify. Both the State and

appellant's trial counsel asked Bachar questions directed to illuminate whether appellant knew that Bachar was attempting to pull him over. In closing, appellant's trial counsel argued that appellant "did not realize that [sic] officer was trying to pull him over until the second the officer got behind him." The State argued that appellant's weaving between lanes and speeding made it clear he knew he was being pulled over. Ultimately, the jury was left to determine whether appellant was aware that Bachar was attempting to detain him.

After briefly deliberating, the jury returned with a guilty verdict.

C. Post-trial

Attorneys for the State and for appellant interviewed the jury after announcement of the verdict. One of the jurors informed the attorneys that while they were in the jury room deliberating, they heard a siren coming from outside on the street fifteen floors below. The members of the jury reasoned that if they could hear the siren while inside the building, appellant should have been able to hear the officer's siren while in his vehicle. The juror said this reasoning was used by the jury as a whole in finding appellant guilty of the charged offense.

Appellant filed a motion for new trial arguing that (1) the jury received adverse outside evidence during deliberation and (2) appellant received ineffective assistance of counsel. The trial court held a hearing on the motion. Before appellant and the State presented their arguments, appellant's counsel offered affidavits from appellant's trial counsel and co-counsel in which each attorney recounted the jury's comments regarding hearing a siren while deliberating. Appellant's counsel pointed out that the State agreed with the "factual basis of the affidavit" and that there was solely a "dispute on the law." Counsel for the State replied, "that's correct." And when asked by the trial court whether the State had any objections to the affidavits, the State's counsel replied, "no objections, your

honor." The court admitted the affidavits into evidence. Appellant's counsel then presented his arguments on the two issues. After which, the State responded by arguing that the allegations in the affidavit did not constitute an "outside influence."[3]

After listening to arguments and reviewing the affidavits presented by both parties, the trial court denied the motion for new trial on both grounds. On appeal, appellant argues the trial court erred in denying his motion for new trial on the same grounds he raised in his motion for new trial.

ANALYSIS

A. Other Evidence

In his motion for new trial, appellant argued that Texas Rule of Appellate Procedure 21.3(f) required that the trial court grant him a new trial because the siren heard by the jury constituted "other evidence." *See* Tex. R. App. P. 21.3(f) (defendant must be granted new trial when, after retiring to deliberate, the jury has received other evidence). The trial court denied appellant's motion, concluding that the jurors could have drawn on their "general experience of hearing sirens."

1. Standard of Review

Ordinarily, the grant or refusal of a motion for new trial is committed to the discretion of the trial court. *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012). However, Texas Rule of Appellate Procedure 21.3(f) provides that a defendant must be granted a new trial when, after retiring to deliberate, the jury has

[3] The dissent argues this was sufficient to preserve an objection based on Texas Rule of Evidence 606(b), as it references the language used in that rule. *See* Tex. R. Evid. 606(b). We disagree. The State's complaint regarding "outside evidence" was not presented until after the affidavit was admitted into evidence and after appellant's counsel made his arguments. Moreover, the State never made a formal objection to the affidavit at any time during the hearing.

received other evidence. Tex. R. App. P. 21.3(f). To be entitled to a new trial under this provision, the movant for new trial must show both: (1) the jury received other evidence and (2) the evidence was detrimental. *Gibson v. State*, 29 S.W.3d 221, 224 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). At a hearing on the motion for new trial, the trial judge is the trier of fact and the sole judge of the credibility of the witnesses. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). If there is no fact issue that the jury received other evidence, and the evidence was adverse to the defendant, then reversal is required. *Rogers v. State*, 551 S.W.2d 369, 370 (Tex. Crim. App. 1977).

2. Analysis

Appellant contends that during the new-trial hearing the State conceded that the "receipt" prong of the applicable two-part test has been met. At the hearing, appellant provided an affidavit from his trial counsel stating the following:

> During our conversation with the jury, one of the jurors told us that during their deliberations, while they were in the jury room, the members of the jury heard a siren outside on the street, and that the fact they could hear the siren from inside the jury room influenced their verdict. They believed that if they could hear a siren from inside the building, that [appellant] could have heard an officer's siren inside his car.

The State's counsel affirmed that it agreed with the factual basis of this affidavit, specifically that the "conversation with the jury took place." The State neither contested that the jury heard and discussed the siren while deliberating, nor that the members of the jury had relied on their ability to hear the siren in finding appellant guilty. Further, the State did not present evidence to counter trial counsel's affidavit. Because there is no evidence contradicting trial counsel's unobjected-to affidavit, no factual dispute in that regard was presented for the trial court's resolution. This satisfies the "receipt" prong of the test. *See Alexander v. State*, 610

S.W.2d 750, 751–52 (Tex. Crim. App. [Panel Op.] 1980) (where testimony as to what occurred in jury room is not controverted and shows that jury during deliberation received other and new evidence, then there is no issue of fact for trial court's determination); *Rogers*, 551 S.W.2d at 370 (holding unless there was fact issue raised on whether jury actually received other evidence, former Code of Criminal Procedure article 40.03(7)[4] required reversal if evidence was adverse to defendant); *Carroll v. State*, 990 S.W.2d 761, 762 (Tex. App.—Austin 1999, no pet.) (no conflicting evidence that jury received "other evidence" during deliberation).

We consider the character of the evidence in light of the issues before the jury in our determination of the "detrimental" prong of the test. *Alexander*, 610 S.W.2d at 753; *Carroll*, 990 S.W.2d at 762. One (if not, the) central issue in this evading-detention case was whether appellant was aware that Bachar was attempting to detain him. Appellant's counsel argued that appellant was not aware he was being pulled over until appellant came to an abrupt stop when Bachar narrowed down the distance between his vehicle and appellant's vehicle. Appellant's ability to hear Bachar's siren was critical to the issue of whether appellant knew he was being signaled by Bachar to pull over. The siren heard by the members of the jury sitting inside on the fifteenth-floor of a building—while they were deliberating on whether appellant was in fact evading detention from an officer with an activated siren—was detrimental to appellant in their resolution of

[4] Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, § 5, art. 40.03, 1973 Tex. Gen. Laws 1122, 1127–28, *repealed by* Tex. R. App. P.30(b)(7), 11 Tex. Reg. 1939, 1944, 49 Tex. B.J. 558, 564 (Tex. Crim. App. Apr. 10, 1986, eff. Sept. 1, 1986); *see* Act of May 27, 1985, 69th Leg., R.S., ch. 685, § 4, 1985 Tex. Gen. Laws 2472, 2472 (authorizing promulgation of Texas Rules of Appellate Procedure and repeal of portions of Code of Criminal Procedure); *see also In re M.A.F.*, 966 S.W.2d 448, 450 n.1 (Tex. 1998) (discussing history of and "almost identical language in" former article 40.03(7) and its successors former Texas Rule of Appellate Procedure 30(b)(7) and current rule 21.3(f)).

this issue. *See Deary v. State*, 681 S.W.2d 784, 788 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd) (statement by juror concerning his experience in paying more than $200.00 for a cassette player "was detrimental to the appellant because his guilt on the felony charge depended upon whether the value of the cassette player exceeded $200.00"). As stated in trial counsel's affidavit, the jury's ability to hear the siren from fifteen floors above led the members of the jury to believe that appellant must have heard Bachar's siren, but deliberately ignored it in an attempt to evade detention. This is supported by the uncontested affidavit provided by trial counsel stating, "that the fact they could hear the siren from inside the jury room influenced their verdict."[5] Rule 21.3(f) mandates reversal when the jury received other evidence that was detrimental. *Carroll*, 990 S.W.2d at 762; *see Rogers*, 551 S.W.2d at 370. Consequently, the trial court lacked discretion to deny appellant's motion for new trial. For this reason, we sustain appellant's first issue.[6]

[5] The State argues that Texas Rule of Evidence 606(b) prohibited the trial court from considering evidence inquiring into the validity of the jury's verdict because the siren heard by the jury does not fall within the outside-influence exception. *See* Tex. R. Evid. 606(b) (prohibiting jurors from testifying about any statement made or incident that occurred during jury's deliberation, except where outside influence was improperly brought to bear on any juror). The State did not, however, object to the evidence on this or any other ground and therefore has waived its complaint. *See Lee v. State*, 816 S.W.2d 515, 517 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (State waived rule 606(b) argument on appeal when it failed to make such objection in hearing below). The State instead expressly stated it had "[n]o objections" to appellant's evidence. Accordingly, an analysis under rule 606(b), as proffered by the State, is not applicable under the circumstances.

[6] The dissenting opinion disputes that the siren here functioned as other evidence based on an average juror's "common knowledge of the sound of a siren" and on the frequency of sirens heard in downtown Houston. However, this position ignores the unique circumstances in this case. This was not a jury merely hearing busy downtown sounds while deliberating. Nor was it a jury merely drawing on general common knowledge of sirens. Rather, the jury focused on one particular siren it heard while deliberating; thus, the jury discussed and considered information it received about a fact connected with this case which was not shown by the trial evidence. This was contrary to the court's charge, and it was used to resolve a critical issue in appellant's case against him and in favor of the State.

The issue in this appeal is not whether a criminal conviction should be reversed because

There is no additional requirement to show harm. *See Alexander*, 610 S.W.2d at 753 ("[T]his Court will not speculate on the probable effects on the jury or the question of injury."); *Hunt v. State*, 603 S.W.2d 865, 869 (Tex. Crim. App. [Panel Op.] 1980) ("The State's contention that appellant must show harm by the jury's receipt of this 'other evidence' is without merit."); *Deary*, 681 S.W.2d at 788 ("We need not consider, nor would it be proper to consider, [juror's] statement that [other juror's] comments made [him] change his mind to vote guilty."). This is because the statutory provision applied here was designed by the Legislature to guarantee the integrity of the fundamental right to trial by jury by restricting the jury's consideration of evidence to that which is properly introduced during the trial. *Rogers*, 551 S.W.2d at 370. To adequately safeguard that right from erosion, the Legislature in its wisdom created a per se rule, and it is the duty of this court to follow such mandate. *See Alexander*, 610 S.W.2d at 753 (citing *Rogers*, 551 S.W.2d at 370 (interpreting rule 21.3(f)'s predecessor statute, former Code of Criminal Procedure article 40.03(7), to require reversal without conducting harm analysis)); *see also Garza v. State*, 630 S.W.2d 272, 276 (Tex. Crim. App. [Panel Op.] 1981) (op. on reh'g) (declining to conduct harm analysis under predecessor statute); *Molina v. State*, No. 07-00-0029-CR, 2003 WL 141641, at *4 (Tex. App.—Amarillo Jan. 21, 2003, pet. ref'd) ("Because appellant established both elements necessary to show his entitlement to a new trial under Rule 21.3(f), we must, and do, sustain his issue."); *McGary v. State*, 658 S.W.2d 673, 674–75 (Tex. App.—Dallas 1983, pet. ref'd) (declining to conduct harm analysis under predecessor statute); *Chew v. State*, 804 S.W.2d 633, 638–39 (Tex. App.—San Antonio 1991, pet. ref'd) (same); *Shivers v. State*, 756 S.W.2d 442, 444–45 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (same); *Deary*, 681 S.W.2d at 788

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the jury heard a siren in downtown Houston while deliberating. The issue is whether the jury followed the court's charge.

(same).[7]

CONCLUSION

We reverse the trial court's judgment and remand the case for further proceedings. Tex. R. App. P. 43.2(d).[8]

/s/ Charles A. Spain
Justice

Panel consists of Justices Christopher, Bourliot, and Spain. (Christopher, J., dissenting.)

Publish. Tex. R. App. P. 47.2(b).

[7] The *Carroll* court acknowledged that "[r]ule 21.3(f) mandates a new trial," but also alternatively analyzed harm "[a]ssuming the constitutional harmless analysis applies." 990 S.W.3d at 762–63. We decline to do so.

[8] We do not reach appellant's argument on ineffective assistance of counsel because of our disposition of appellant's first issue (reverse and remand for further proceedings). *See* Tex. R. App. P. 47.1.

APPENDIX B

(Justice Christopher's dissent in *Najar v. State*)

Reversed and Remanded and Majority and Dissenting Opinions filed August 29, 2019.

In The

Fourteenth Court of Appeals

NO. 14-17-00785-CR

ZAID ADNAN NAJAR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1503083

DISSENTING OPINION

I disagree with several aspects of the majority's decision.

I. The majority errs by not applying Rule 606(b) of the Texas Rules of Evidence.

The majority correctly recognizes that, under Rule 21.3(f) of the Texas Rules of Appellate Procedure, the defendant must be granted a new trial "when, after retiring to deliberate, the jury has received other evidence." But the majority fails to

appreciate that Rule 606(b) of the Texas Rules of Evidence limits the method in which a defendant can prove that he is entitled to a new trial under Rule 21.3(f). *See Hicks v. State*, 15 S.W.3d 626, 630 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) ("By generally prohibiting jurors from testifying as to matters and statements occurring during deliberations, rule 606(b) unquestionably makes proving jury misconduct in criminal trials more difficult than it was under prior rules.").

The majority contends that the State waived any complaint under Rule 606(b)—and thus, the majority declines to conduct any sort of Rule 606(b) analysis—because the prosecutor affirmatively stated that she had "no objections" to the affidavits. But the record is ambiguous on that point. When the affidavits were offered into evidence, defense counsel acknowledged that "we have a dispute on the law." The prosecutor then went on to argue that the siren discussed in the affidavits was not an "outside influence," which invokes the language of Rule 606(b). The prosecutor also referred explicitly to *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012), which is one of the leading cases applying Rule 606(b). The record accordingly shows that all parties understood that Rule 606(b) was squarely before the trial court.

II. The majority errs by not considering the affidavits under the appropriate standard of review.

Even if the prosecutor had not invoked Rule 606(b) and *McQuarrie*, or had waived a complaint under those authorities, the trial court was under no obligation to credit the affidavits' hearsay testimony that the jury had been influenced by the hearing of a siren. And under the applicable standard of review, the majority should have held that the trial court did not believe that hearsay testimony. *See Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (recognizing that a trial court can determine that an affidavit lacks credibility, even when the affidavit is

uncontroverted). By reaching the opposite conclusion that the siren influenced the jury to the detriment of appellant, the majority fails to view the evidence in the light most favorable to the trial court's ruling.

III. The majority errs by concluding that the sound of a siren is "other evidence" under Rule 21.3(f).

The majority also errs by holding that the jury received "other evidence." This is not a case where an exhibit was mistakenly sent to the deliberation room, like in *Bustamante v. State*, 106 S.W.3d 738 (Tex. Crim. App. 2003). Instead, this is a case where, if the affidavits are to be believed, the jury merely heard a siren coming from the street. There has been no showing that the siren was intentionally activated to influence the jury. And the sound of a siren is already within the common knowledge of the average juror, which is reason enough to uphold the trial court's ruling that there was no outside influence (or receipt of other evidence detrimental to appellant). *See McQuarrie*, 380 S.W.3d at 153 ("A Rule 606(b) inquiry is limited to that which occurs outside of the jury room and outside of the juror's personal knowledge and experience."); *cf. Diaz v. State*, 660 S.W.2d 93, 94–95 (Tex. Crim. App. 1983) (recognizing that jurors are already aware that some inmates are released early on parole, and "the mere mention of this common knowledge would not constitute receipt of other evidence"); *Ex parte Trafton*, 271 S.W.2d 814, 816 (Tex. Crim. App. 1953) (op. on reh'g) (same regarding the usual sounds of an automobile); *Borroum v. State*, 8 S.W.2d 153, 155–56 (Tex. Crim. App. 1927) (op. on reh'g) (same regarding the effect of being shot); *Frazer v. State*, 268 S.W. 164, 166 (Tex. Crim. App. 1924) (same regarding bullet holes and powder burns); *Saenz v. State*, 976 S.W.2d 314, 321–23 (Tex. App.—Corpus Christi 1998, no pet.) (same regarding how spent shells are ejected from semi-automatic weapons).

Sirens are frequently heard in downtown Houston—so frequently in fact that the burden on the judicial system would be extreme if trial courts were required to insulate the jury whenever those external sounds might be related to an issue in a case. Part of that problem stems from the fact that the sirens originate not just from police, but also from fire and EMS. Whether these departments have similar or different sirens is not apparent from the record. In any event, there has been no showing that the siren heard by this jury necessarily belonged to a police unit, as the majority implicitly assumes.

IV. The majority errs by concluding that the siren was detrimental.

In a case implicating Rule 606(b), a court must use an objective "reasonable person" test to decide what effect the outside influence would have had on the "hypothetical average juror." *See Colyer v. State*, 428 S.W.3d 117, 129 (Tex. Crim. App. 2014). This is the standard that the majority should have applied if it determined that the siren was an outside influence (which it was not). And under this objective standard, the majority should have held that there was no adverse effect because the sound of a siren is already within the common knowledge of the average juror.

The majority nonetheless holds that the siren was detrimental because the central issue in the case was whether appellant was aware that the officer was trying to pull him over. But there was overwhelming evidence that appellant was so aware. The officer testified that when he activated his emergency lights and siren, appellant immediately deactivated his illegal strobe light and then sped off for more than a mile. That testimony, which was emphasized by the prosecutor in closing statements, shows that appellant knew that he needed to stop from the very beginning of the chase.

Also, there was no evidence that appellant could *not* hear the officer's siren (say, for example, because appellant was hard of hearing, or because the music in his car was playing very loudly). During closing arguments, defense counsel had no response at all to the evidence that appellant had heard the officer's siren. This omission undermines the majority's conclusion that the jury's hearing of a siren was detrimental to appellant's case.

Based on the foregoing, I would overrule appellant's first issue and consider his remaining point of ineffective assistance of counsel. Because the majority does not, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Bourliot, and Spain.
Publish — Tex. R. App. P. 47.2(b).